Supreme Court, U.S.
FILED
FEB 23 1998
CLERK

No. 97-1056

IN THE
Supreme Court of the United States

OCTOBER TERM, 1997

NAOMI MARQUEZ,

Petitioner,

v.

SCREEN ACTORS GUILD, INC., and
LAKESIDE PRODUCTIONS, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF

RAYMOND J. LAJEUNESSE, JR.
Counsel of Record
National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, VA 22160
(703) 321-8510

ATTORNEY FOR PETITIONER

February 23, 1998

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ARGUMENT

I. The Court Should Grant Certiorari in This Case, Because Conflict Among the Courts of Appeals Concerning the Facial Validity of Agreements That Purport to Require Payment of Full Union Dues Could Continue If Certiorari Is Granted Only in *Buzenius*.

The first question the Petition of Naomi Marquez ("Ms. Marquez") for a Writ of Certiorari presents is whether section 8(a)(3) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(a)(3) (1988), and the statutory duty of fair representation permit compulsory unionism agreements that misleadingly purport to require "membership" and payment of full union dues as a condition of employment, although section 8(a)(3), as definitively interpreted by this Court, prohibits enforcement of those requirements. (*See* Pet. at i, ¶ I, 8-15.)

Respondent Screen Actors Guild ("SAG") agrees that this question "is identical to the question presented by the *certiorari* petition in *Paperworkers v. Buzenius*," 66 U.S.L.W. 3427 (U.S. docketed Dec. 8, 1997) (No. 97-945). (SAG's Mem. at 5.) SAG concedes that this "is a question that has generated a deep conflict among the circuits." SAG also admits "that the issue of the facial validity of standard form 'membership' union security clauses is an important recurring federal labor law issue." (*Id.* at 7.)

However, SAG argues that in this case this question should merely "be disposed of in conformity with the disposition of the earlier filed . . . *Buzenius* . . . petition," rather than be considered by the Court on its merits. SAG contends that, for three reasons, this case is "a less appropriate vehicle than . . . *Buzenius* for resolving the issue dividing the circuits." (*Id.* at 7-8.) None of the reasons SAG gives justifies not granting this Petition, either alone or together with the petition in *Buzenius*.

First, SAG asserts that this case does not more completely present the question it has in common with *Buzenius*, because, SAG says, the compulsory unionism clause here "does *not* in terms require[] every performer *both* to be 'a member of the

Union in good standing' *and* to pay periodic dues and initiation fees, or define 'member in good standing.'" (*Id.* at 7-8 (quoting Pet. at 14-15) (citations and internal quotation marks omitted) (alteration in original).) This assertion is a disingenuous quibble.

In *Buzenius*, the compulsory unionism provision only says that employees "'shall become and remain members of the Union in good standing as a condition of employment.'" As the Sixth Circuit noted, that provision "does not define 'member in good standing.'" *Buzenius v. NLRB*, 124 F.3d 788, 789 (6th Cir. 1997), *petition for cert. docketed*, 66 U.S.L.W. 3427 (U.S. Dec. 8, 1997) (No. 97-945). Thus, *Buzenius* does not necessarily present the question of whether a compulsory unionism provision is facially invalid if it defines "membership" as the payment of full union dues and initiation fees and does not explain that the maximum obligation under *Communications Workers v. Beck*, 487 U.S. 735 (1988), is payment of that part of dues related to collective bargaining and contract administration.

This case does necessarily present the question in that form. To "define" means "to fix or mark the limits of" something. *Webster's New Collegiate Dictionary* 297 (1977). In addition to stating that every performer must be "a member of the Union in good standing," the agreement here says that the

> Producer shall not be held to have violated this paragraph if it employs a performer who is not a member of the Union in good standing, . . . if the Producer has reasonable grounds for believing that membership in the Union was denied . . . or . . . terminated for reasons other than the failure of the performer to tender the periodic dues and the initiation fee uniformly required as a condition of acquiring or retaining membership in the Union . . . .

(Walker Dep., Ex. 7 at 6 (filed Dec. 28, 1995).)

Thus, as SAG said in its brief in the court of appeals, "the clause here does . . . recite"—*i.e.*, define—"the full set of limitations on the enforcement of [the membership] obligation stated in NLRA § 8(a)(3)," (Appellee's Br. at 22), but not the

additional limitation recognized in *Beck*. (*See also* Pet'rs' Reply Br. at 9, *Buzenius*) ("the *Marquez* clause . . . puts a gloss on the term 'membership in good standing'").[1] Therefore, if the Court grants the Petition in this case, it must necessarily decide a question that it could avoid in *Buzenius*: whether employees' *Beck* rights must be mentioned in the compulsory unionism provision.

Second, SAG argues that the compulsory unionism "clause here is *sui generis*," while that in *Buzenius* "is a standard form 'membership' clause." (SAG's Mem. at 8.) This argument also is disingenuous, because in the court of appeals SAG referred to its clause as "a ***standard*** union shop clause." (Appellee's Br. at 22 (emphasis added).)

Reported decisions of lower courts on this issue show that SAG's clause is similar to many others in defining "membership" as the payment of full dues. For example, in *Wegscheid v. Auto Workers Local 2911*, as here, the compulsory unionism clause was "a close paraphrase of the language . . . from section 8(a)(3) of the" NLRA. 117 F.3d 986, 988 (7th Cir. 1997). And, in *Schreier v. Beverly California Corp.*, which involved yet a third union, the compulsory unionism provision also defined membership "in good standing" as the payment of full union dues and initiation fees. 892 F. Supp. 225, 226 (D. Minn. 1995). Thus, the question presented more concretely here than in *Buzenius* is one that is likely to arise again and again unless the Court settles it now in this case.

Third, SAG contends that "the interlocutory nature of the decision below[] makes this case . . . a less appropriate vehicle than . . . *Buzenius* for resolving the issue dividing the circuits." (SAG's Mem. at 8.) However, this Court may exercise its jurisdiction under 28 U.S.C. § 1254(1) (West 1993) over a court of appeals' interlocutory decision where, as here, there is a conflict among the federal courts of appeals over a fundamental

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[1] One of the attorneys for SAG, Laurence Gold, is counsel of record for the union in *Buzenius*.

question. *See, e.g., United States v. General Motors Corp.*, 323 U.S. 373, 374-77 (1945); *Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403, 408-09 (1916).

Moreover, the court of appeals' remand will not affect the questions presented by this Petition, because the issues remanded concern only the enforcement of the compulsory unionism provision, not its facial validity. *(See* Pet. App. at 19a, 21a.) Thus, the questions presented here are precisely the same as they would be on a second appeal and petition for certiorari after a final judgment on remand. As to these questions, the court of appeals' decision is effectively final, because the issues "will survive and require decision regardless of the outcome of future . . . proceedings" in the lower courts. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 480 (1975).

On the other hand, because the remanded issues are fact bound, the proceedings on remand are unlikely to raise additional questions that might require review by this Court on a second appeal. Therefore, "immediate rather than delayed review would be the best way to avoid 'the mischief of economic waste and of delayed justice,'" as well as to end the conflict among the courts of appeals that might continue if certiorari is granted only in *Buzenius* (and that will certainly continue if certiorari is denied in both cases). *See Cox Broadcasting*, 420 U.S. at 477-78 (quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945)).

II. SAG Does Not Explain Why the Duty of Fair Representation Is Breached, and the Federal Courts Have Jurisdiction, If a Union Misrepresents the *Extent* of an Employee's Obligations Under Section 8(a)(3), But Not If It Misrepresents *When* Those Obligations Apply.

The second question this Petition presents is whether the National Labor Relations Board ("NLRB") has exclusive jurisdiction over a claim that a union breached the duty of fair representation by negotiating a compulsory unionism provision that misleadingly informs performers who have been employed in the entertainment industry for more than thirty days that they must be union members before they begin any future employment. (*See* Pet. at i, ¶ II, 15-19.)[2] SAG argues that this claim is clearly within the NLRB's exclusive jurisdiction because it is "a claim resting solely on an alleged violation of NLRA § 8(a)(3)." (SAG's Mem. at 9.)

However, SAG does not argue that the NLRB has exclusive jurisdiction over a claim that a union breached the duty of fair representation by negotiating a compulsory unionism provision that misleadingly informs employees that they must be members and pay full union dues. Such an argument is foreclosed by this Court's decision in *Beck*, which held that the latter claim is ***not*** within the NLRB's exclusive jurisdiction, even though that claim also rests "solely" on an alleged violation of section 8(a)(3), *i.e.*, the attempted imposition of obligations not permitted by section 8(a)(3). *See* 487 U.S. at 742-44.

In *Wegscheid*, the Seventh Circuit explicitly ruled, based on *Beck*, that "an alleged violation of section 8(a)(3) is litigable in a district court suit challenging [misleading] statements" that "happen to be contained in the collective bargaining agreement, since the union's duty of fair representation can be violated by union conduct in the negotiation of a collective bargaining agreement, as well as in the enforcement of it." 117 F.3d at 989 (citations omitted). SAG asserts that, nonetheless, *Wegscheid* does not support court jurisdiction here, because *Wegscheid* considered only "the entirely distinct legal question" of "the facial validity of union security clauses that speak in terms of a 'membership' requirement." (SAG's Mem. at 9.)

However, SAG does not explain how the question of the facial validity of a compulsory unionism clause that misleadingly speaks in terms of a membership requirement that violates section 8(a)(3) is "entirely distinct" from the question of the facial validity of a clause that misleadingly speaks in terms of a thirty-day employment-in-the-industry requirement that also violates section 8(a)(3). Logically, there is no distinction. Thus,

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[2] This question also includes whether, if the Board's jurisdiction is not exclusive, the breach occurred here. (Pet. at i, ¶ II.)

on this second question there is a direct conflict, that this Court should resolve, between the Seventh Circuit's decision in *Wegscheid* and the Ninth Circuit's in this case.

SAG also relies on the Ninth Circuit's observation that "[t]he factually complex question of how properly to apply § 8(a)(3)'s requirements to hiring practices in the motion picture industry is precisely the kind of question that . . . the NLRB was designed to address." (Pet. App. at 13a, *quoted in* SAG's Mem. at 10.) However, this is not a factually complex issue. It is a simple question of statutory interpretation. *See Theatrical Stage Employees Local 644*, 259 N.L.R.B. 1415, 1416, 1422 (1982).

Congress has specified exceptions to section 8(a)(3)'s requirement that employees have a thirty-day "grace period" with every employment relationship where ***Congress*** has found that hiring practices in a particular industry justify an exception. *See* 29 U.S.C. § 158(f) (1988). Congress has made no exception for the entertainment industry.

Thus, hiring practices in the motion picture industry are irrelevant in applying the thirty-day "grace period" requirement, as the NLRB itself recognized in *Theatrical Stage Employees Local 644*, 259 N.L.R.B. at 1422. Moreover, there also are no exceptions to the rule that NLRB preemption "does not extend to suits alleging a breach of the duty of fair representation," regardless of "the subject matter of the fair representation claim presented, the relative expertise of the NLRB in the particular area of labor law involved, or any other factor." *Breininger v. Sheet Metal Workers Local 6*, 493 U.S. 67, 74-76 (1989).

III. Neither the Employer Nor SAG Disputes That the Question of the Court of Appeals' Dismissal of the Employer Should Be Reviewed If the Court Grants Certiorari on Either of the Other Questions Presented.

The third question this Petition presents is whether the employer, Respondent Lakeside Productions, Inc. ("Lakeside"), is an indispensable party to this suit, and should not have been dismissed, because the remedy for both alleged facial defects in the collective-bargaining agreement is reformation or expunge-

ment. (*See* Pet. at i, ¶ III, 19-20.) Lakeside has not opposed the grant of certiorari. SAG argues that this third question is not worthy of this Court's review, because it is a question "that is entirely derivative of the merits of Ms. Marquez's challenge to the facial validity of the agreement." (SAG's Mem. at 10 n.4.)

This question is indeed derivative of the merits of the first two questions presented. As such, it probably falls within the rule that the "statement of any question presented is deemed to comprise every subsidiary question fairly included therein." Sup. Ct. R. 14.1(a). Out of an abundance of caution, this issue is stated as a separate question in the Petition.

SAG does not dispute that the Ninth Circuit's holding that Lakeside is not a necessary party for full relief directly conflicts with the contrary holding of the Seventh Circuit in *Wegscheid*, 117 F.3d at 988. The Court should grant certiorari on this question as well if, and only if, it grants certiorari on either or both of the first two questions presented.

CONCLUSION

The Court should grant this Petition on all questions presented, and, if a writ also is issued in *Buzenius*, set the cases for argument consecutively or consolidate and hear them together.

Respectfully submitted,

RAYMOND J. LAJEUNESSE, JR.
Counsel of Record
National Right to Work Legal Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, VA 22160
(703) 321-8510

ATTORNEY FOR PETITIONER

February 23, 1998